



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 18, 1994

Ms. Tracy R. Briggs  
Assistant City Attorney  
City of Houston  
P.O. Box 1562  
Houston, Texas 77251-1562

OR94-451

Dear Ms. Briggs:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 27337.

The City of Houston (the "city") has received a request for four categories of documents, including "access to files on each and every house remodeled or rehabilitated under the Urban Homesteading program, including, but not limited to, loan and grant payments; loan extensions; forgiveness loans, construction records; and records of payments for hotel and apartment stays associated with the program." With the exception of this category of information, we understand that the city has released the information to the requestor. You contend that section 552.101 of the Government Code requires the city to withhold the information it has not released.

At the outset, we note that you failed to seek a decision within ten calendar days after receiving the request for information. You state that the city received this request on June 15, 1994. Our office received your letter seeking an open records decision on July 1, 1994. Pursuant to section 552.301 of the Government Code, "[a] governmental body that receives a written request for information that it considers to be within one of the exceptions [to required public disclosure] must ask for a decision from the attorney general . . . not later than the 10th calendar day after the date of receiving the written request." Gov't Code § 552.301(a). Failure timely to request the attorney general's decision results in a presumption that the requested information is public, *id.* § 552.302, and a governmental body may overcome this presumption only by showing that the information is confidential or that an exception designed to protect the interest of a third party is applicable. *See* Open Records Decision No. 552 (1990) at 1. Section 552.101, which you have raised, pertains to confidential information. We will, therefore, proceed to consider your request for an open records decision.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 thus incorporates other statutory provisions that make specified documents confidential. Additionally, it incorporates the doctrines of constitutional and common-law privacy.

The Texas Supreme Court, in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), articulated a two-pronged test that we use to determine whether information is confidential under the doctrine of common-law privacy and therefore exempt from required public disclosure under section 552.101. Under the test, information is confidential if (1) it contains highly intimate or embarrassing facts about an individual's private affairs such that the release of the information would be highly offensive to a reasonable person and (2) the public has no legitimate interest in it. *Industrial Found.*, 540 S.W.2d at 685.

With regard to the "files on each and every house remodeled or rehabilitated under the Urban Homesteading program, including, but not limited to, loan and grant applications; loan and grant payments; loan extensions; forgiveness loans; construction records . . .," you state the city's opinion that this is financial information confidential under the common-law right of privacy as well as some federal statutory law. You cite Open Records Decision No. 373 (1983) as precedent supporting the city's opinion.

In Open Records Decision No. 373 this office considered whether the statutory predecessor to section 552.101 of the Government Code required the City of Austin to withhold from public disclosure applications to a city-administered program to receive a federally funded loan or grant to rehabilitate applicants' homes. According to the decision, the application files contained information about an applicant's sources of income, employment, salary, mortgage payments, assets, medical and utility bills, social security and veterans' administration benefits, verification of employment and mortgage payments, credit history, age, ethnic origin, and family composition. Open Records Decision No. 373 at 1.

The decision initially noted that several federal statutes deem confidential certain information in the files: 42 U.S.C. § 1306 (social security benefit information); 26 U.S.C. § 7213 (federal income tax information); 38 U.S.C. § 3301, *renumbered as* 38 U.S.C. § 5701 by Pub. L. 102-40, Title IV, § 402(c)(1) (veterans' administration benefit information). Open Records Decision No. 373 at 2. Also, title 15 of the United States Code section 1681b strictly limits the distribution of consumer credit reports. *Id.*

The decision next considered whether the doctrine of common-law privacy applied to information in the files that specific statutes did not deem confidential, *id.* at 2-3, and concluded that

all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and

state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common-law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

*Id.* at 3; see *Industrial Found.*, 540 S.W.2d at 685. The decision next considered the second prong of the common-law privacy test, concluding that

the second requirement of the common-law privacy test . . . ordinarily [cannot] be satisfied where the only relation of the individual to government is as an applicant for a housing rehabilitation grant. While it is true that the public has some interest in knowing whether public funds expended in such grants are being given to qualified applicants, we believe that in the ordinary situation this interest will not be sufficient to justify the invasion of the applicant's privacy that would result from disclosure of information concerning his financial status. Because, however, a requestor may, by showing "special circumstances," overcome the presumption that there is no sufficient legitimate public interest in private information of an intimate nature, we conclude that the determination of whether the public's interest in obtaining this information is sufficient to justify its disclosure must be made on a case-by-case basis.

*Id.* at 3-4.

Significantly, this office did not conclude that financial information in the requested application files was, as a matter of law, excepted from required public disclosure. *Id.* at 4. Rather, a showing of "special circumstances" could demonstrate a legitimate public interest in the information sufficient to overcome the presumption of confidentiality. *Id.* Furthermore, Open Records Decision No. 373 concerned financial information about individuals whose "only relation . . . to the government is as an applicant for a housing rehabilitation grant." *Id.* at 3.

Additionally, this office did not conclude in Open Records Decision No. 373 that all of the information in the file was confidential. Instead, we concluded that information about an applicant's family composition, employment, age, and ethnic origin was not confidential under statutory, constitutional, or the common law. *Id.* at 4.

We agree that Open Records Decision No. 373 is pertinent to the information requested here. We note, however, that two of the individuals whose files you have submitted for our review are not connected to the government solely by virtue of their receipt of a grant from the Urban Homesteading Program: they are employees of a governmental body. Information regarding the salaries they receive from the government is public. See Gov't Code § 552.022(2).

One of these two individuals receives his salary as the recipient of a work-study program through the Department of Veterans Affairs. As we noted in Open Records Decision No. 373, the statutory predecessor to title 38 of the United States Code section 5701 makes confidential certain information regarding veterans' benefits. Pursuant to subsection (a), however, the confidentiality section 5701 accords to records related to veterans' benefits applies only to records "in the possession of the Department." Furthermore, subsection (c)(1) explicitly requires the Secretary of Veterans Affairs to release to any person who requests it "[t]he amount of any payment . . . to any person receiving benefits under any program administered by the Secretary." Consequently, we conclude that the city must release to the requestor the amount of payments to a person receiving veterans' benefits.

We have marked the representative applicant files you submitted for our review in accordance with our conclusions here.<sup>1</sup> Note that we have not marked the social security numbers that appear in the files. In Open Records Decision No. 622 (1994) this office concluded that a social security number is excepted from required public disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii), only if a governmental body obtained or maintains the social security number in accordance with a provision of law enacted on or after October 1, 1990. You have not indicated whether the city obtained or maintains these employees' social security numbers pursuant to a statute enacted on or after October 1, 1990. We thus cannot determine whether the city may withhold the applicants' social security numbers from the requestor.<sup>2</sup>

With regard to the "records of payments for hotel and apartment stays associated with the program," you assert that section 24.9, title 49 of the Code of Federal Regulations, incorporated into section 552.101 of the Government Code, deems these records confidential. Part 24 of title 49 of the Code of Federal Regulations implements the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 40 U.S.C. ch. 61, and is designed to ensure that owners of real property that the government wishes to acquire for federal and federally assisted projects, as well as

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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records you have submitted to this office accurately represents the requested information as a whole. See Open Records Decision Nos. 499 at 6 (stating that governmental body may submit representative sample of requested documents if they are numerous and repetitive, but that governmental body must submit all requested documents if each contains substantially different information), 497 at 4 (1988) (same). This open records letter does not reach, and therefore does not authorize this governmental body to withhold, any other requested records to the extent that those records contain substantially different types of information than the information you have submitted to this office.

<sup>2</sup>Any person who distributes information considered confidential under chapter 552 of the Government Code commits a misdemeanor punishable by a fine of not more than \$1,000, confinement in the county jail for not more than six months, or both. Gov't Code § 552.352(a), (b). Furthermore, such a person is subject to prosecution for official misconduct. See *id.* § 552.352(c).

persons displaced<sup>3</sup> as a direct result of federal or federally assisted projects, are treated fairly, consistently, and equitably. 49 C.F.R. § 24.1(a), (b). The United States Department of Transportation is authorized to promulgate regulations under the Uniform Relocation Assistance and Real Property Acquisition Policies Act. Presidential Memorandum, 50 F.R. 8953, *reprinted in* 42 U.S.C. § 4633 (1985); *see* 42 U.S.C. § 4633(a)(1).

Section 24.9, title 49 of the Code of Federal Regulations, provides in pertinent part as follows:

(a) *Records.* The Agency<sup>4</sup> shall maintain adequate records of its acquisition and displacement activities in sufficient detail to demonstrate compliance with this part. These records shall be retained for at least 3 years after each owner of a property and each person displaced from the property receives the final payment to which he or she is entitled under this part, or in accordance with the applicable regulations of the Federal funding agency, whichever is later.

(b) *Confidentiality of records.* Records maintained by an Agency in accordance with this part are confidential regarding their use as public information, unless applicable law provides otherwise.<sup>5</sup> [Footnote added.]

We will assume for purposes of this decision that section 24.9 is a valid rule. *See* Open Records Decision No. 476 (1987) at 5 (stating that federal regulation adopted pursuant to

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<sup>3</sup>Section 24.2(g), 49 C.F.R., defines "displaced person" in general as

any person who moves from the real property or moves his or her personal property from the real property: . . .

(i) as a direct result of a written notice of intent to acquire, the initiation of negotiations for, or the acquisition of, such real property in whole or in part for a project[;]

(ii) as a direct result of rehabilitation or demolition for a project; or

(iii) as a direct result of a written notice of intent to acquire, or the acquisition, rehabilitation or demolition of, in whole or in part, other real property on which the person conducts a business or farm operation for a project.

<sup>4</sup>In the context of part 24 of title 49 of the Code of Federal Regulations, the term "Agency" means the Federal agency, State, State agency, or person that acquires real property or displaces a person. 49 C.F.R. § 24.2(a).

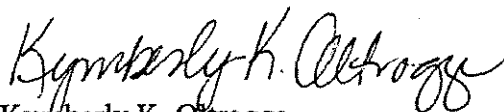
<sup>5</sup>We have not been informed that any applicable laws provide otherwise.

statutory authority may provide statutory confidentiality for purposes of statutory predecessor to section 552.101).

We conclude that section 24.9 deems confidential all records that an agency maintains to document, in sufficient detail to demonstrate compliance with this part, its acquisition and displacement activities. You have informed us that the copies of "the records of payments for hotel and apartment stays associated with the program" that you have submitted for our review are related to the displacement of persons by HUD-assisted program activities. Thus, section 24.9, incorporated into section 552.101 of the Government Code, requires the city to keep this information confidential.<sup>6</sup>

Because case law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,

  
Kimberly K. Oltrogge  
Assistant Attorney General  
Open Government Section

KKO/SLG/rho

Ref.: ID# 27337

Enclosures: Marked documents

cc: Mr. James Robinson  
Reporter  
Houston Chronicle  
P.O. Box 4260  
Houston, Texas 77210  
(w/o enclosures)

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<sup>6</sup>You also cite the HUD Handbook No. 1378, *Tenant Assistance, Relocation and Real Estate Acquisition*, chapter 6, paragraph 6-1(c), which provides that "[r]ecords maintained by the grantee/Agency to demonstrate compliance with the policies in this handbook are confidential. They shall not be made available as public information, unless required by applicable law." Because we determine that section 24.9 deems confidential the information at issue, we do not consider the impact of this statement in the HUD handbook.